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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

SHIH-HUA ALAN LEE,

Petitioner,

v.

PONANI SUKUMAR, an individual, and
SARASWATI SUKUMAR, an individual,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION ONE

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

The circuit courts of appeal (as well as state courts) are split as to whether an exception exists to this Court's mandate that a question-by-question inquiry is necessary before a witness can avoid testifying by asserting the Fifth Amendment. Here, both the trial and appellate courts applied that exception and excused Petitioner's sole corroborating witness in a civil trial from testifying without any question-by-question inquiry.

The question presented here is whether a court can rule the Fifth Amendment protects all of a witness's testimony without inquiring into the actual proposed testimony and not thereby violate the due process rights of the litigant proffering the witness's testimony.

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STATEMENT OF JURISDICTION

The decision of the Court of Appeal of California was entered on November 20, 2000. Appendix ("App.") 1a. The Supreme Court of California denied a timely petition for review on February 14, 2001. App. 33a. This petition for a writ of certiorari is timely filed pursuant to 28 U.S.C. § 2101(c) and Sup. Ct. R. 13.1.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides in full:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in

> the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. V.

STATEMENT OF THE CASE

A. Factual Background.

Petitioner Shih-Hua Alan Lee ("Lee") is a businessman who resides in Singapore. Lee and Respondent Ponani Sukumar ("Ponani") became close friends in graduate school. Ponani was then married to Respondent Saraswati Sukumar ("Saraswati"), a cancer research specialist.

The Sukumars and Lee made joint real estate investments. Ponani received money from Lee to cover expenses from those investments and purportedly also for the personal needs of the Sukumar family. Over the course of about 13 years, Lee transferred sums to the Sukumar household which, including compounded interest, total approximately $1,300,000.

B. Trial Court Proceedings.

In late 1994, Saraswati petitioned for divorce. Lee then filed this action against Ponani and Saraswati in the Superior Court of California, County of San Diego, to recover the

transferred money Lee contended had been loans.[1] Before trial, Lee settled with Ponani for approximately one-half the allegedly owed amount.

Three days before the scheduled trial, Saraswati filed a request for judicial notice that, among other things, requested the trial court take judicial notice it is a felony to make a false representation on a loan application with a federally insured bank.

Ponani moved to stay the trial. He believed Saraswati's request for judicial notice implicated his right under the Fifth Amendment of the United States Constitution not to give incriminating testimony and wanted to consult with a criminal attorney. (2 AA at 458-63; 1 RT at 2.)[2] The trial court denied Ponani's request. (2 AA at 475.)

In chambers, Lee's counsel objected to Ponani's invocation of the Fifth Amendment because the absence of Ponani's corroborating testimony would be extremely prejudicial to his case. (3 RT at 411-14.) Lee's counsel explained he intended to call Ponani as a witness and Ponani's testimony was "critical" to Lee's case. (1 RT at 11; *see also* 3 RT at 411-12; 1 AA at 242.) Lee's counsel objected to the lack of an in camera review of the proposed testimony. (3 RT at 411-14.) The court ruled that, because Ponani had invoked the Fifth Amendment, no further inquiry was required or even allowed. (3 RT at 413, 416-17.)

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1. On December 17, 1997, Saraswati filed a voluntary petition for Chapter 7 bankruptcy in Maryland. On April 20, 1998, the bankruptcy court granted relief from stay under section 362 of the Bankruptcy Code to allow Lee to complete this litigation.

2. "RT" refers to the Reporter's Transcript and "AA" refers to the Appellant's Appendix that were filed with the California Court of Appeal.

On the first day of trial, Ponani's trial attorney counseled him to invoke the Fifth on everything "except his name" on the stand. (1 RT at 4; *see also* 3 RT at 416.) Accordingly, the parties stipulated that if Ponani were called to testify "he would assert the Fifth Amendment to everything relevant to these proceedings other than his name." (2 RT at 135.) Ponani agreed to an in camera examination to determine whether his testimony was indeed privileged. (1 RT at 6.) The trial court declined and simply stated Ponani "does not have to testify in any way should he choose to assert his Fifth Amendment." (1 RT at 8.) The court remarked, "it is time consuming and boring to ask someone a lot of questions and have that person continually assert the Fifth Amendment." (1 RT at 12.)

The trial proceeded without Ponani's testimony. The only witnesses who testified were Lee, Saraswati and an expert witness who attempted to reconstruct the Sukumar family finances.

On the last day of trial, Lee requested the case be reopened to put Ponani on the stand for a question-by-question inquiry as to whether the Fifth Amendment truly applied to the proposed testimony. (3 RT at 411-17.) Lee's counsel again explained the lack of Ponani's corroborating testimony was to the "great prejudice" of Lee's case. (3 RT at 411.) The court denied Lee's request. (3 RT at 417-18; 2 AA at 487.)

The trial court issued a statement of decision, concluding Saraswati had no knowledge of Lee's cash transfers to Ponani and that those transfers were gifts and not loans. Accordingly, the court ruled for Saraswati on all Lee's claims.

C. California Court of Appeal Decision.

On appeal, the Court of Appeal of the State of California, Fourth Appellate District, Division One ("California Court of Appeal") affirmed the judgment in an opinion filed November 20, 2000.[3] The California Court of Appeal recognized the rule that a witness cannot refuse to testify by invoking the Fifth Amendment privilege against self-incrimination in a blanket fashion. Rather, a witness must assert the privilege on a question-by-question basis because only then can the court make the particular determination necessary to sustain invocation of the privilege. App. 7a. However, the California Court of Appeal then recognized an exception to this rule. The California Court of Appeal held a trial court need not undertake the "ritual" of requiring the witness to invoke the privilege to each individual question when, based on its knowledge of the case, the court concludes the witness will properly invoke the privilege as to all relevant questions. App. 7a-8a.

The California Court of Appeal then held Lee's request to reopen the case for an inquiry as to whether the Fifth Amendment privilege applied to Ponani's testimony should have been granted. However, the Court of Appeal found the error was not prejudicial. Apparently applying the exception to the rule requiring a question-by-question inquiry, the Court

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3. The trial court had also awarded Saraswati sanctions under California Code of Civil Procedure section 128.7. The court found the lawsuit was presented primarily for an improper purpose, the suit was frivolous, and the allegations in the complaint were without credible evidentiary support. However, the Court of Appeal reversed the sanction award because Saraswati had failed to comply with the safe harbor requirement of California Code of Civil Procedure section 128.7.

of Appeal found no prejudice because it could not conceive of any relevant testimony by Ponani that would not have been incriminating. App. 13a. Thus, the California Court of Appeal affirmed the judgment.[4]

D. California Supreme Court Denial of Review.

Lee filed in the California Supreme Court a petition for review. The petition asserted review should be granted because the court erroneously applied an exception to the rule requiring a question-by-question inquiry before ruling on whether the Fifth Amendment applies and this prevented Lee from having a full and fair opportunity to present his case. The California Supreme Court denied review on February 14, 2001.

REASONS FOR GRANTING THE WRIT

A. The Nation's Courts are Split on the Proper Test for Determining When the Fifth Amendment Privilege Applies: Some Federal Circuits and State Courts Have Adopted a Discretionary Exception Never Endorsed by This Court.

The Fifth Amendment to the United States Constitution provides "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend V. Article 1, section 15 of the California Constitution provides identical protections. *See* Cal. Const. art. I, § 15; *see also* Cal. Evid. Code § 940 (West 1995) ("To the extent that such

4. At trial, Lee's counsel asserted Ponani's unprivileged testimony would establish the relationship and communications between Ponani and Saraswati, authenticate critical documents, describe Ponani's employment and establish the nature of Ponani's relationship with Lee.

privilege exists under the Constitution of the United States or the State of California, a person has a privilege to refuse to disclose any matter that may tend to incriminate him.").

States are prohibited by the Fourteenth Amendment from infringing upon the Fifth Amendment privilege against self-incrimination. *Malloy v. Hogan*, 378 U.S. 1, 6 (1964). Thus, the same standards in both state and federal proceedings must be applied to determine whether a party's or a witness's refusal to testify under the Fifth Amendment is justified. "It would be incongruous to have different standards determine the validity of a claim of privilege based on the same feared prosecution, depending on whether the claim was asserted in a state or federal court." *Id.* at 11.

The Fifth Amendment privilege against self-incrimination is an issue that arises often and in a wide variety of cases. The privilege applies alike to civil and criminal proceedings: "wherever the answer might tend to subject to criminal responsibility him who gives it." *McCarthy v. Arndstein*, 266 U.S. 34, 40 (1924). The Fifth Amendment privilege protects third-party witnesses as well as parties. *Id.* A recent electronic search in a national database revealed the privilege against self-incrimination was raised in at least 735 cases (213 federal and 522 state) decided in 2000.[5]

Currently, courts across the nation inconsistently determine when a witness or a party in a civil or criminal proceeding can invoke the Fifth Amendment privilege. Many federal circuit courts and some states follow the bright line test established by this Court that a question-by-question

5. Of course, the privilege was likely raised in numerous other cases in 2000 that were unreported or are otherwise unavailable in the database.

inquiry is required without exception. Other federal circuit courts and some state courts recognize a broad and amorphous exception that such an inquiry is not required simply when the court, in its discretion and particular knowledge of the case, believes any relevant question would be privileged and any inquiry would be "futile." At a minimum, it is crucial the constitutional privilege against self-incrimination — long recognized as one of the constitutional rights that is core to good government and our citizens' liberty — be applied in a consistent matter. Currently, witnesses seeking to invoke their privilege against self-incrimination and parties who have a right to that testimony are accorded different process under the law. One witness may avoid even taking the witness stand with a blanket statement of "I take the Fifth" while another witness must invoke the privilege seriatim and allow the court to analyze, question-by-question, whether the privilege applies. Different applications of the fundamental privilege against self-incrimination based merely on where a witness or party happens to be in court is itself a denial of due process to the witness and the parties who depend on that witness's testimony. Given the importance of the Fifth Amendment privilege against self-incrimination and how often this privilege is invoked, this Court has a substantial interest in assuring the privilege is applied correctly and uniformly.

1. This Court Has Consistently Forbidden a "Blanket" Invocation of the Fifth Amendment Privilege and Established All Courts Must Perform a Question-by-Question Inquiry Before Determining Whether the Privilege Applies.

For more than one hundred years, this Court has held it is error simply to grant a witness or party the Fifth Amendment privilege without inquiry. *See Brown v. Walker*, 161 U.S. 591, 599-600 (1896); *Hoffman v. United States*, 341 U.S. 479, 486 (1951). To properly claim the privilege, a witness must actually refuse to answer an incriminating question. *See Rogers v. United States*, 340 U.S. 367, 374 (1951). The assertion of the privilege cannot be made in a vacuum. *Mason v. United States*, 244 U.S. 362, 364-66 (1917). "As to each question to which a claim of privilege is directed, the court must determine whether the answer to that particular question would subject the witness to a 'real danger' of further crimination." *Rogers*, 340 U.S. at 374 (citing *Heike v. United States*, 227 U.S. 131, 144 (1913)) (footnote omitted); *see also Brown*, 161 U.S. at 600. Otherwise, the one asserting the privilege becomes "the final arbiter of the merits of the claim." *See Albertson v. Subversive Activities Control Bd.*, 382 U.S. 70, 79 (1965). As this Court stated in *Mason*: "[w]hen a question is propounded, it belongs to the court to consider and to decide whether any direct answer to it can implicate the witness. . . . [T]he trial judge must determine each claim according to its own particular circumstances." *Mason*, 244 U.S. at 364-66; *see also* Aaron Van Oort, Comment, *Invocations as Evidence: Admitting Nonparty Witness Invocation of the Privilege Against Self-Incrimination*, 65 U. Chi. L. Rev. 1435, 1445 (1998).

In *United States v. Sullivan*, 274 U.S. 259, 263 (1927), this Court specifically rejected the assertion of a blanket Fifth Amendment privilege. The defendant in *Sullivan* was convicted for failing to file a tax return. The Fourth Circuit reversed, reasoning the Fifth Amendment excused defendant from filing any tax return because all his earnings came from illegal activity. This Court reversed the Fourth Circuit, finding a blanket assertion is "contrary to the Constitution." *Id.* at 263-64. This Court held that, if the tax return called for privileged answers, the defendant could have raised his objection in the return, "but could not on that account refuse to make any return at all." *Id.* at 263. "He could not draw a conjurer's circle around the whole matter by his own declaration that to write any word upon the government blank would bring him into danger of the law." *Id.* at 264 (citing *Mason*, 244 U.S. 362); *see also California v. Byers*, 402 U.S. 424, 428-29, 434 (1971) (citing *Sullivan*, and rejecting a blanket Fifth Amendment assertion as excuse for failure to report an accident under "hit and run" statute).

This Court has unerringly required a question-by-question inquiry by the trial court as to the basis of the privilege before a witness may be excused from testifying under the Fifth Amendment. This Court has never adopted nor recognized an exception to the rule that prohibits a blanket assertion of the privilege against self-incrimination.

2. Several Federal and State Courts Have Adopted an Amorphous Discretionary Exception to this Court's Rule Requiring a Question-By-Question Inquiry.

Over the years, several courts have created a broad and amorphous exception to this Court's rule that a question-by-question inquiry must be performed before the Fifth Amendment privilege is applied. This exception, as articulated by the Ninth Circuit, is: "A trial court may sustain a claimed right to refuse to testify if the court, based on its knowledge of the case and of the testimony expected from the witness, can conclude that the witness could 'legitimately refuse to answer essentially all relevant questions.' " *United States v. Tsui*, 646 F.2d 365, 368 (9th Cir. 1981) (quoting *United States v. Goodwin*, 625 F.2d 693, 701 (5th Cir. 1980)). This exception is based on the idea that, "when it is clear that the witness intends to invoke the privilege with respect to any question asked, a particularized inquiry by the court would [be] futile." *United States v. Gibbs*, 182 F.3d 408, 431 (6th Cir. 1999) (internal quotation marks and citation omitted), *cert. denied*, 528 U.S. 1051 (1999). As discussed below, this exception has been applied and recognized in the First, Fifth, Sixth, Ninth and District of Columbia Circuits as well as several states.[6]

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6. States which have adopted this exception include: Arizona (*State v. McDaniel*, 665 P.2d 70, 76 (Ariz. 1983), abrogated on other grounds by *State v. Walton*, 769 P.2d 1017 (Ariz. 1989)); Colorado (*People v. Maestas*, 685 P.2d 791, 793 (Colo. Ct. App. 1984)); Florida (*Faver v. State*, 393 So. 2d 49, 50 (Fla. Dist. Ct. App. 1981)); Idaho (*State v. Ramsey*, 576 P.2d 572, 574 (Idaho 1978)); Kansas (*State v. Palmer*, 657 P.2d 1130, 1135 (Kan. Ct. App. 1982)); (Cont'd)

The Ninth Circuit, in *United States v. Tsui*, after acknowledging the rule requiring a question-by-question inquiry as to the basis of the privilege, recognized an exception to this rule. The *Tsui* court found the trial court was in a position to conclude "that any response to all possible questions would tend to incriminate the witness." *Tsui*, 646 F.2d at 367. Thus, the Ninth Circuit found failing to ascertain the basis of the privilege in a question-by-question manner was not error. *Id.* at 368; *see also United States v. Moore*, 682 F.2d 853, 856 (9th Cir. 1981).

The Sixth Circuit has also recognized this exception, reasoning a question-by-question inquiry is often impractical and "futile." *Gibbs*, 182 F.3d at 431-32. In *Gibbs*, the Sixth Circuit first recognized the rule against blanket assertions of Fifth Amendment: "[T]he law of this circuit requires the subpoenaed witness to take the witness stand and assert the [Fifth Amendment] privilege in response to particular questions. . . . A witness cannot meet the reasonable-fear-of-prosecution prong by simply making a blanket assertion of the privilege against self-incrimination." *Id.* at 431 (internal quotation marks and citations omitted). The *Gibbs* court then went on: "However, in certain circumstances, when it is clear that the witness intends to invoke the privilege with respect to any question asked, a particularized inquiry by the court would [be] futile." *Id.* (internal quotation marks omitted) (alteration in original). The court then held the trial court had wrongly allowed the assertion of a blanket privilege, but it was harmless error because it seemed clear

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(Cont'd)

New Hampshire (*State v. Bell*, 298 A.2d 753, 757 (N.H. 1972)); Utah (*Affleck v. Third Judicial Dist. Court of Salt Lake County*, 655 P.2d 665, 667 (Utah 1982)); Washington (*State v. Delgado*, 18 P.3d 1141, 1143 (Wash. Ct. App. 2001)).

to the Court of Appeal that all potential questions would involve privileged information. *Id.* at 431-32; *see also United States v. Medina*, 992 F.2d 573, 587 (6th Cir. 1993) (when it is clear witness intends to invoke privilege to all questions, "a particularized inquiry by the court would [be] futile.").

The Fifth Circuit has also endorsed this exception on several occasions. In *United States v. Gomez-Rojas*, 507 F.2d 1213, 1220 (5th Cir. 1975), the Fifth Circuit held a trial court may sustain a claimed right to refuse to testify if, based on its knowledge of the case and of the testimony expected from the witness, the court concludes the witness could "legitimately refuse to answer essentially all possible relevant questions." *Id.*; *see also United States v. Goodwin*, 625 F.2d 693 (5th Cir. 1980) (same). Although finding insufficient basis for the exception, the Fifth Circuit in *S.E.C. v. First Financial Group of Texas*, 659 F.2d 660 (5th Cir. 1981), stated: "Only where the court finds that [the witness] could 'legitimately refuse to answer essentially all relevant questions,' because of the threat of incrimination from any relevant questioning is a person totally excused from responding to relevant inquiries." *Id.* at 668-69 (citation omitted).

The First Circuit affirmed its adoption of this exception in *United States v. Johnson*, 488 F.2d 1206, 1211 (1st Cir. 1973). In that case, the First Circuit held: "If it appears that a witness intends to claim the privilege as to essentially all questions, the court may, in its discretion, refuse to allow him to take the stand. . . ." *Id.*

Finally, the Court of Appeals for the District of Columbia has adopted this exception. In *United States v. Thornton*, 733 F.2d 121 (D.C. Cir. 1984), that court recognized:

"Usually, a trial court cannot speculate whether all relevant questions would or would not tend to incriminate the witness; accordingly, the court normally requires the privilege to be asserted in response to specific questions." *Id.* at 125. Then the court stated: "In unusual cases, however, a district judge may sustain a blanket assertion of privilege after determining that there is a reasonable basis for believing a danger to the witness might exist in answering *any* relevant question." *Id.* at 126 (emphasis in original). The District of Columbia Circuit then held the district court properly concluded that any relevant testimony would compromise the witness's ability to defend himself against pending criminal charges. *Id.*; *see also United States v. Ortiz*, 82 F.3d 1066, 1073 (D.C. Cir. 1996) (in "unusual cases" a court may sustain blanket assertion of Fifth Amendment privilege after finding a reasonable basis for believing danger to witness might exist in answering any relevant questions); *United States v. Reese*, 561 F.2d 894, 900 (D.C. Cir. 1977) (blanket privilege sustained because "the only relevant matters" that the witness might have testified about would be privileged).

3. Other Federal and State Courts Have Declined to Adopt This Exception.

By comparison, the Second, Third, Fourth, Seventh, Eighth, Tenth and Eleventh Circuits, as well as several states, have refused to adopt this exception.[7] Rather, these

7. State courts that have apparently refused to adopt this exception include: Texas (*In re Verbois*, 10 S.W. 3d 825, 828 (Tex. Ct. App. 2000)); Mississippi (*In re Knapp*, 536 So. 2d 1330, 1334 (Miss. 1988)); North Dakota (*American State Bank of Dickinson v. Stoltz*, 345 N.W.2d 365, 369 (N.D. 1984)); Georgia (*Spivey v. State*, 407 S.E.2d 425, 426 (Ga. Ct. App. 1991)). The Federal Circuit, because it generally applies the substantive law of the circuit where the case was commenced, is not a part of this analysis.

jurisdictions have unwaveringly required a particularized inquiry by the trial court before the privilege can completely excuse a witness or party from testifying.

For example, the Second Circuit, in *United States v. Zappola*, 646 F.2d 48, 53 (2d Cir. 1981), rejected the "blanket assertion of the fifth amendment privilege in response to all questions asked of him [and requires the trial court to] undertake a particularized inquiry to determine whether the assertion was founded on a reasonable fear of prosecution as to each of the posed questions." *Id.*; *see also Hudson Tire Mart, Inc. v. Aetna Cas. & Sur. Co.*, 518 F.2d 671, 674 (2d Cir. 1975) ("Only after the incriminating question is asked, is he in a position to assert his immunity and seek a protective order."); *In re Turner*, 309 F.2d 69, 71 (2d Cir. 1962) ("[L]ike any other witness he must obey the process of the authority summoning him to appear and claim the constitutional privilege as particular questions are asked."). No decision in the Second Circuit has ever adopted an exception to this rule.

The Third Circuit has also unerringly followed the rule that a witness may not assert a blanket privilege against self-incrimination prior to actually being questioned. "The court . . . cannot effectively determine whether 'a responsive answer to a question or an explanation of why it cannot be answered might be (incriminating)' except in the context of a propounded question." *National Life Ins. Co. v. Hartford Accident & Indem. Co.*, 615 F.2d 595, 598 (3d Cir. 1980) (citing *Hoffman v. United States*, 341 U.S. 479, 487 (1951)). "It is apparent . . . that a witness cannot relieve himself of the duty to answer questions that may be put to him by a mere blanket invocation of the privilege." *Id.*; *see also In re United States Hoffman Can Corp.*, 373

F.2d 622, 627 (3d Cir. 1967) (Fifth Amendment does not allow refusal to supply altogether any information required by the schedules and statement of corporations without inquiry by the court). No Third Circuit decision has ever applied an exception to this rule.

Similarly, the Fourth Circuit has continuously affirmed its stance of not tolerating a blanket refusal to testify under the Fifth Amendment. In *North River Ins. Co. v. Stefanou*, 831 F.2d 484 (4th Cir. 1987), the defendant gave a blanket refusal to answer any questions in discovery regarding the allegations of a complaint (including allegations of jurisdiction, venue, and the existence of his accounting firm). The Fourth Circuit held: "A party wishing in good faith to assert the privilege must do so 'with respect to particular [allegations],' thereby allowing the trial judge to determine the propriety of each refusal." *Id.* at 487 (quoting *General Dynamics Corp. v. Selb Mfg. Co.*, 481 F.2d 1204, 1212 (8th Cir. 1973)) (alteration in original).

The Seventh Circuit in *In re Folding Carton Antitrust Litigation*, 609 F.2d 867 (7th Cir. 1979), has recognized this Court requires a particularized inquiry before ruling the Fifth Amendment does or does not protect a witness's testimony. "[A]s to each question to which a claim of privilege is directed, the court must determine whether the answer to that particular question would subject the witness to a 'real danger' of further incrimination." *Id.* at 873 (quoting *Rogers v. United States*, 340 U.S. 367, 374 (1951)); *see also United States v. Cappetto*, 502 F.2d 1351, 1359 (7th Cir. 1974) (civil defendant cannot "refuse to be sworn or refuse to submit to questioning [but may only claim] the Fifth Amendment to refuse to answer a specific question on the ground that the answer may tend to incriminate him."). No decision in the Seventh Circuit has ever adopted an exception to this rule.

The Eighth Circuit has also consistently required a question-by-question inquiry before a court can grant a witness the right not to testify under the Fifth Amendment. In *Capitol Prods. Co. v. Hernon*, 457 F.2d 541 (8th Cir. 1972), the Eighth Circuit affirmed there is no blanket Fifth Amendment right to refuse to answer questions. "The privilege must be specifically claimed on a particular question and the matter submitted to the court for its determination as to the validity of the claim." *Id.* at 542 (citation omitted); *see also Daly v. United States*, 393 F.2d 873, 878 (8th Cir. 1968) (defendant "cannot assert the privilege to every question asked by the examiner. . . . [A] proper hearing should make proper inquiry upon the individual questions involved."); *General Dynamics*, 481 F.2d at 1212 (1973) (privilege must be asserted as to particular questions, and in each instance, court must determine propriety of refusal to testify). No Eighth Circuit case has ever recognized an exception to this rule.

The Tenth Circuit, in *United States v. Carroll*, 567 F.2d 955 (10th Cir. 1977), confirmed its similar position: "The circuits have held with great uniformity that a blanket refusal to answer questions does not suffice to raise constitutional questions." *Id.* at 957; *see also Martinez v. IRS*, 744 F.2d 71, 72 (10th Cir. 1984) (taxpayers were properly sanctioned for claiming blanket Fifth Amendment privilege excused them from providing any information on tax return). No Tenth Circuit case has adopted an exception to the rule requiring a question-by-question inquiry.

Finally, the Eleventh Circuit also strictly follows the rule that a question-by-question inquiry is required. In *United States v. Argomaniz*, 925 F.2d 1349, 1355 (11th Cir. 1991), the Eleventh Circuit stated a court must review assertions of

the privilege against self-incrimination on a question-by-question basis to provide the court with the specific information necessary to determine whether the privilege applies and to establish a record for review. *Id.*; *see also Anglada v. Sprague*, 822 F.2d 1035, 1037 (10th Cir. 1987) (witness must assert privilege as to particular questions asked).

B. The California Court of Appeal Erred in Applying This Discretionary Exception to the Rule Against a Blanket Invocation of the Fifth Amendment Privilege; the Exception Renders Decisions to Apply the Fifth Amendment Unreviewable, Invites Error and Interferes with Litigants' Due Process Rights.

The California Court of Appeal in this case recognized and applied the same exception to the rule against a blanket invocation of the Fifth Amendment that, as discussed, *supra*, has been adopted by some courts but rejected by others. Here, the Court of Appeal stated a court should generally require "assertion of the privilege on a question-by-question basis . . . since only when a witness does so is the court able to make the particular determination necessary to sustain invocation of the privilege." App. 7a. The Court of Appeal then stated: "However, when the court based on its knowledge of the case concludes the witness will properly invoke the privilege as to all relevant questions, it need not undertake the ritual of requiring the witness to invoke as to each individual question." App. 7a-8a. This is exactly the same exception to the rule of a question-by-question inquiry adopted by five federal circuit courts and several states.

Here, the Court of Appeal applied this exception at the appellate level and allowed itself to determine the Fifth

Amendment protected all of Ponani's possibly relevant testimony without any inquiry whatsoever. The Court of Appeal stated the trial court erred in not reopening the case and, as Lee's trial counsel requested, placing Ponani on the stand to assess whether or not the Fifth Amendment applied. However, the Court of Appeal held that error was nonprejudicial because — without any question-by-question inquiry by either itself or the trial court — the Court of Appeal simply concluded Ponani could offer no relevant testimony that would not be privileged. Thus, the Court of Appeal employed the exception that a court has the power to determine, without any inquiry whatsoever, that there is no relevant testimony that would not incriminate the witness. *See, e.g., United States v. Gibbs*, 182 F.3d 408, 431-32 (6th Cir. 1999) (applying exception at appellate level to conclude failure to conduct question-by-question inquiry was not prejudicial error); *cf. United States v. Moore*, 682 F.2d 853, 857-58 (9th Cir. 1982).

Courts must be required to make a meaningful determination of when answers tend to incriminate a witness if the general duty to testify is to remain and the privilege against compelled incriminating answers is to be retained. *See The Queen v. Boyes*, 1 B. & S. 311, 329-330 (Q.B. 1861); *Mason v. United States*, 244 U.S. 362 (1917). Here, petitioner Lee was denied due process when the sole corroborating witness in his case was allowed a blanket invocation of the Fifth Amendment without any inquiry as to whether the privilege truly applied to all possible testimony. "A fundamental requirement of due process is the opportunity to be heard. It is an opportunity which must be granted at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) (internal quotation marks and citation omitted). If a party cannot present a significant

witness, that party loses the right to be heard on evidence to which only the witness can testify. However, a witness also has an important constitutional right; the privilege against self-incrimination. The only proper way to balance these competing constitutional rights is for the court to conduct some inquiry into the basis for the privilege against self-incrimination. As Chief Justice Marshall said:

> The principle which entitles the United States to the testimony of every citizen, and the principle by which every witness is privileged not to accuse himself, can neither of them be entirely disregarded. . . . When a question is propounded, it belongs to the court to consider and to decide whether any direct answer to it can implicate the witness.

In re Willie, 25 F. Cas. 38, 39-40 (C.C.D. Va. 1807) (No. 14,692e). "While it is the duty of the court to protect the witness in the exercise of his privilege, it is also the duty of the court to see that he does not, under the pretense of defending himself, screen others from justice." Charles H. Rabon, Jr., Note, *Evening the Odds in Civil Litigation: A Proposed Methodology for Using Adverse Inferences When Nonparty Witnesses Invoke the Fifth Amendment*, 42 Vand. L. Rev. 507 (1989) (internal quotation marks and citation omitted).

Scholars have recognized the privilege against self-incrimination is often improperly invoked in civil cases at the expense of litigants and the search for truth. "Current Fifth Amendment jurisprudence sacrifices the determination of truth, the policies underlying liberal discovery, and the vindication of public and private rights to an extent rarely

appreciated." Dennis J. Bartlett, Note, *Adverse Inferences Based on Nonparty Invocations: The Real Magic Trick In Fifth Amendment Civil Cases*, 60 Notre Dame L. Rev. 370, 375 (1985) (internal quotation marks and citation omitted); *see also* Rabon, *supra*, 42 Vand. L. Rev. at 524-26. By invoking the privilege against self-incrimination at every opportunity, defendants and other witnesses can prevent a plaintiff from obtaining discovery or can convince the court (wrongly) they cannot even be called to testify. Robert Heidt, *The Conjurer's Circle — The Fifth Amendment Privilege in Civil Cases*, 91 Yale L.J. 1062, 1081-82 (1982). Accordingly, commentators have urged more emphasis on assuring a fair trial rather than protecting the claimant of the privilege in civil litigation. In civil proceedings, where the government is not a party, many of the policies behind strictly enforcing the privilege are inapplicable. *See Rabon, supra*, 42 Vand. L. Rev. at 524-26.

For the simple reason a witness may not always correctly invoke the privilege, it is error to allow a witness a blanket invocation of the privilege without inquiry. *Smith v. United States*, 337 U.S. 137, 147 (1949); *Brown v. Walker*, 161 U.S. 591, 605 (1896). Requiring the formality of a question-by-question inquiry under oath increases the likelihood the witness will take the proceedings seriously and will make an accurate invocation of the privilege. Van Oort, *supra*, 65 U. Chi. L. Rev. at 1454. This procedure allows a court to "detect false invocations." *Id.* It also assures an adequate record for any subsequent claim the privilege was wrongly applied. *See, e.g., United States v. Argomaniz*, 925 F.2d 1349, 1355 (11th Cir. 1991). Finally, a question-by-question inquiry is undeniably requisite in civil proceedings because, unlike a criminal defendant's privilege, a nonparty witness's privilege "springs into existence" only after a specific

question has been asked. Van Oort, *supra*, 65 U. Chi. L. Rev. at 1445; *see also Hudson Tire Mart Inc. v. Aetna Cas. & Sur. Co.*, 518 F.2d 671, 674 (2d Cir. 1975).

The only apparent rationale for the exception to requiring a question-by-question inquiry is that such an inquiry may be "futile" or, as the trial court decided here, "time consuming and boring." However, it is well-established these types of considerations cannot override constitutional rights. "If [requiring a court to consider certain facts in determining whether a witness has validly asserted his or her privilege against self-incrimination] adds to the burden of diligence and efficiency resting on enforcement authorities, any other conclusion would seriously compromise an important constitutional liberty." *Hoffman v. United States*, 341 U.S. 479, 489-90 (1951); *see also Toledo Area AFL-CIO Council v. Pizza*, 154 F.3d 307, 313 (6th Cir. 1998) ("No matter how popular these efforts are, we must examine them for conformity with the Constitution to insure that the rights there preserved are not sacrificed for 'an expedient solution to the crisis of the day.'" (quoting *New York v. United States*, 505 U.S. 144, 187 (1992))).

This Court should grant certiorari to settle the important question of what is the correct procedure for a court to determine whether the Fifth Amendment privilege against self-incrimination protects a witness's testimony. Assuring the Fifth Amendment is properly and fairly applied is undoubtedly an important question of law. This Court has previously held a question-by-question inquiry is necessary before a court can decide whether the Fifth Amendment protects particular testimony. However, as discussed, several federal circuit courts of appeal and state courts have created an exception to this rule that allows a court to find, without

any inquiry, the privilege protects all of a witness's testimony when a court simply believes all relevant testimony would incriminate the witness. This exception "swallows the rule" and threatens the judicious and constitutional application of our most fundamental values of a fair trial and the right against self-incrimination. For all these reasons, this Court should grant certiorari.

CONCLUSION

For the reasons set forth above, Petitioner Shih–hua Alan Lee respectfully requests this petition for writ of certiorari be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE COURT OF APPEAL FOR THE FOURTH APPELLATE DISTRICT, DIVISION ONE, STATE OF CALIFORNIA DATED AND FILED NOVEMBER 20, 2000

COURT OF APPEAL, FOURTH APPELLATE DISTRICT
DIVISION ONE
STATE OF CALIFORNIA

D032371
(Super. Ct. No. 708406)

SHIH-HUA ALAN LEE,

Plaintiff and Appellant,

v.

SARASWATI SUKUMAR,

Defendant and Respondent.

APPEAL from a judgment of the Superior Court of San Diego County, J. Richard Haden, Judge. Reversed in part; affirmed in part.

Shih-Hua Alan Lee sought recovery of money allegedly loaned over several years to Ponani Sukumar (Ponani)[1] and Saraswati Sukumar (Saraswati). At a bench trial the court

1. Ponani had counsel of record who did not file any briefs or papers, did not respond to California Rules of Court, rule 17(b) notice and did not appear in court at oral argument. Ponani's motion for a 25-day extension to file an application for leave to file an amicus curiae brief was denied on March 8, 2000.

rejected Lee's claim, finding he gave the money to the Sukumars as gifts. Lee appeals, arguing the trial court erred in allowing Ponani to invoke his Fifth Amendment right not to testify and in imposing sanction's pursuant to Code of Civil Procedure[2] section 128.7, subdivision (c).

BACKGROUND

A. *Law Suits*

In February 1997 Lee sued the Sukumars on contract and contract related causes of action alleging unpaid loans to the couple in the amount, including interest owed, of $1,140,805. Lee alleged the loans were made between 1981 and 1994 and arose from an oral contract.

Saraswati cross-complained in April 1997 against Lee and Ponani, alleging she had separated from Ponani in 1994, that she had no knowledge of any oral contract between Lee and Ponani and that Ponani had actively concealed the existence of the alleged loans from her. As to Ponani, Saraswati sought recovery based on breach of fiduciary duty and claimed equitable indemnity as to Lee's contract action. As to Ponani and Lee, Saraswati alleged conspiracy to breach Ponani's fiduciary duty to her.

In May 1997, Ponani filed a cross-complaint against Saraswati, alleging that she was aware of and consented to the loans made by Lee. Ponani sought declaratory relief and equitable indemnification. This action was dismissed before trial.

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2. All further statutory references are to the Code of Civil Procedure.

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In June 1998, Lee and Ponani settled with Ponani essentially conceding the allegations in Lee's complaint with the exception of the amount owed. The parties agreed Ponani would pay Lee $888,000 and surrender his interest in certain real property.

B. *Decision*

At the conclusion of a bench trial the court filed a statement of decision, noting Saraswati and Ponani were married in India in 1970. Saraswati came to the United States in 1978 and Ponani in 1979. Ponani completed his education at the Wharton Business School and took over the bulk of the family finances.

Ponani and Lee were students together at Wharton and lived for a time in the same dormitory and later in the same hotel. They were close friends. When Ponani began work with an insurance company, Lee became his first client. Later, when Ponani worked as a stockbroker, Lee was a client and maintained accounts with him as Ponani moved to various firms.

Lee and the Sukumars entered a joint venture to purchase properties in Maryland and New Jersey. When one of the New Jersey properties was sold in 1986, Saraswati signed the closing documents. Those properties had either been sold or were ordered sold by the court in the Sukumars' dissolution of marriage action.

The court rejected Lee's claim that Saraswati owed him $1,377,255 in repayment of loans. The court noted that

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Ponani was in charge of family finances and kept his dealings a secret from Saraswati. The court found she had no knowledge of any cash payments from Lee to Ponani. The court noted while Lee offered in evidence a series of documents in which Ponani purportedly requested loans from Lee over a period of time, it was the court's conclusion, based on a number of factors, that the documents were produced at the same time and for use at trial.

The court did believe that Lee gave substantial sums of money to Ponani. The court concluded, however, that Lee intended the money as a gift and not a loan. It based this conclusion on the relationship between the men, the informal manner in which the funds were transferred and the way the men treated the money.

The court noted Lee continued to provide large sums of money to Ponani's father which he had no realistic hope of recovering and that Lee and Ponani maintained a social relationship.

The court noted both Saraswati and Lee testified at trial. While the court found Saraswati highly credible, it concluded Lee's testimony was inherently incredible and his claim that the money given to Ponani was intended as loans was unsupported by evidence and unbelievable.

The court concluded there was no oral contract for repayment of a loan and rejected Lee's breach of contract cause of action. The court noted Lee sought leave of court to amend his complaint to state a cause of action for quasi-contract. The court found Lee did not have clean hands, the

evidence did not support that cause of action and rejected his quasi-contract claim.

As to Saraswati's action for conspiracy to breach Ponani's fiduciary obligation, the court found a failure of proof and rejected the claim.

The trial court granted Saraswati's section 128.7 motion for sanctions. The court concluded Lee's lawsuit was undertaken primarily to break Saraswati financially. The court noted that $120,000 of the $546,000 gift to Ponani's father was used to pay Ponani's legal fees in the present case. The court concluded Lee's lawsuit was frivolous and the allegations in the complaint were without credible evidentiary support. The court ordered Lee pay Saraswati $135,736.

DISCUSSION

A. *Fifth Amendment Privilege*

At the beginning of trial Ponani asserted his Fifth Amendment privilege against self-incrimination and stated if called to testify he would give his name and then decline to answer any additional questions. Lee faults the trial court for accepting Ponani's assertion of the privilege without requiring he be placed under oath and without assessing question-by-question whether the privilege was properly asserted.

Appendix A

1. Law

Both the United States and California Constitutions provide a broad privilege against testimonial self-incrimination. The privilege applies not only to criminal defendants but to any person in a criminal, civil, administrative or investigatory setting. The privilege applies not only to testimony that would support conviction but also to testimony that would furnish a link in the chain of evidence needed to prosecute. (*Warford v. Medeiros* (1984) 160 Cal.App.3d 1035, 1042-1044.)

When there is an assertion of the right against self-incrimination, "the person claiming the privilege has the burden of showing that the proffered evidence might tend to incriminate him; and the proffered evidence is inadmissible unless it clearly appears to the court that the proffered evidence cannot possibly have a tendency to incriminate the person claiming the privilege." (Evid. Code, § 404.)

The party claiming the privilege need not produce evidence supporting its invocation. The court rather must consider matters revealed in argument, the evidence in the case, the setting in which the answer is to be given and the implications of that answer. (Comment to Evid. Code, § 404.)[3]

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3. It has been held that in camera hearings concerning the exercise of the privilege against self-incrimination should be limited to determining whether an exception to or a waiver of the privilege exists when those determinations turns on the content of the answer. (*People v. Manago* (1990) 220 Cal.App.3d 982, 990, fn. 4.)

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To sustain the invocation of the privilege against self-incrimination, " 'it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result. The trial judge in appraising the claim "must be governed as much by his personal perception of the peculiarities of the case as by the facts actually in evidence." [Citations.]' [Citation.]" (*Blackburn v. Superior Court* (1993) 21 Cal.App.4th 414, 427-428.)

"No person other than a defendant has a right to refuse to be sworn as a witness. [Citations.] And after administration of the oath, a witness who has a privilege to assert must generally assert on a question-by-question basis. [Citations.] . . . If the court finds a valid privilege exists, it can either limit the questions the parties may ask before the jury or excuse the witness, if it becomes clear that any testimony would implicate the privilege." (*People v. Lopez* (1999) 71 Cal.App.4th 1550, 1555; *Warford v. Medeiros* (1984) 160 Cal.App.3d 1035, 1044-1045.)

The need in general for a specific assertion of the privilege on a question-by-question basis exists since only when a witness does so is the court able to make the particular determination necessary to sustain invocation of the privilege. (*Warford v. Medeiros*, *supra*, 160 Cal.App.3d at pp. 1044-1045.) However, when the court based on its knowledge of the case concludes the witness will properly invoke the privilege as to all relevant questions, it need not undertake the ritual of requiring the witness to invoke as to

each individual question. (*People v. Cornejo* (1979) 92 Cal.App.3d 637, 657-659.)

2. Background

On August 4, 1998, Saraswati requested the court take judicial notice of several matters, including that it was a federal crime to make a false representation on a loan application. This request related to loan applications filed by Ponani which did not list the alleged loans from Lee.

On August 7, 1998, Ponani sought a trial continuance of six weeks to allow him to consider the threat of possible criminal prosecution. On that date the motion was denied.

On the first day of trial, August 10, 1998, Ponani noted he faced possible criminal liability based on the matters involved in the case. He stated any criminal case would raise the exact issues involved in the present civil matter. Ponani requested a stay of the trial on Saraswati's cross-complaint until the statute of limitation ran on his criminal liability — sometime after 2001. Ponani indicated if called to the stand he would state his name and then assert the privilege as to all questions asked. Ponani stated he could discuss in camera the specific reasons for asserting the privilege. Ponani noted he had informed the other parties he would be seeking such a continuance.

The trial court determined Ponani had testified in family court on the same issues. The court noted such testimony did not waive his right to assert the privilege against self-incrimination at trial in the present case. The court denied

the continuance and noted if during trial Ponani was called and asserted his Fifth Amendment privilege it might be necessary to hold an in camera hearing.

As the discussion of Ponani's potential testimony progressed, Lee stated he intended to call Ponani concerning the authentication of documents critical to Lee's case. Lee stated his case would not collapse without Ponani's testimony but his testimony was significant.

The trial court observed it was a time consuming and boring task to ask a witness repeated questions to which he repeatedly asserted his right not to answer. The court stated that with an interest in conserving court time the parties might consider working out the matter themselves.

On the second morning of trial the parties stipulated that if called Ponani would assert his Fifth Amendment privilege as to everything relevant to the case other than his name. The court asked Ponani if there was an expectation of criminal action. Ponani stated he would answer the question in camera but not in open court.

After both parties had rested, Ponani again raised the issue of his assertion of his right against self-incrimination and its possible effect on the admission of his exhibits. Lee raised the same issues, stating that Ponani's failure to testify did great prejudice to his case. The court asked Lee if he had a copy of Ponani's testimony at family court. Lee's counsel stated he did but that testimony was not sufficient for Lee's purposes at trial.

In a confusing exchange, the court asked Lee what would he like it to do. Lee noted the earlier discussion of conducting an in camera hearing at which the court would review documents and proposed testimony. Essentially, Lee asked the court to reopen his case. Lee asked the court to conduct an in camera hearing and review the documents and proposed testimony. He asked the court do so to determine what Ponani could be asked without infringing his Fifth Amendment rights. Ponani would then take the stand and the court could require him to answer questions that did not potentially incriminate him. Lee stated he stipulated that Ponani would assert his Fifth Amendment privilege as to all questions asked only because the court had indicated it would allow Ponani to do so.

The court replied it made no ruling on what it would allow Ponani to do question-by-question. The court denied Lee's motion to reopen his case. The court noted the request to call Ponani was untimely. Lee had known for some time that the problem existed and took no action concerning it. The relationship between Lee and Ponani was such that there was no reason they could not have worked out the problem at an earlier time.

3. Discussion

a. Pretrial Ruling

Ponani's initial global assertion of his right against self-incrimination was legally insufficient. In the face of such an invocation, a trial court is required, generally, either to hear argument and determine that no relevant question could

survive the invocation of the Fifth Amendment privilege or to allow the witness to be called, be placed under oath and rule on each invocation asserted as to each question.

As we read the record, the trial judge, in an attempt to save time and to avoid a ritualistic question-by-question invocation of the privilege, asked the parties to try to work out the issue among themselves. This was reasonable. The parties had conducted discovery and had the benefit of prior court proceedings dealing with the issues. The parties were in a position to decided whether it would be useful to call Ponani, to conduct a further hearing on the matter or to deal with the problem in some other manner. Further, the criminal implications of testimony from Ponani that the monies given him by Lee were loans and not gifts seemed clear. The issue was central to the case and the court may have believed there were few relevant questions that could survive Ponani's invocation of his Fifth Amendment privilege. What is also clear is that the trial court did not rule that Ponani had a right not to be called or that he had a right not to answer any particular question.

When the parties returned to court they entered a stipulation that if called Ponani would state his name and then assert his privilege as to any matter relevant to the case. The stipulation on its face, however, meant nothing; it merely reasserted what Ponani had stated the day before and did not address the issue of the whether he could properly so invoke his privilege. However, given the court's request to the parties, it was reasonable for it to take the stipulation, and Lee's silence on the matter, as a concession that no objection could reasonably be made to the invocation of the privilege.

It may be that Lee misunderstood the trial court and thought it was stating it would make no inquiry into the propriety of Ponani's invocation of his Fifth Amendment privilege. The court, however, had stated if Ponani was called it might be necessary to conduct the in camera hearing Ponani was suggesting. The court did not mislead Lee and was prepared, if the parties could not work out the matter, to address the issue of Ponani's testimony. That was not required during trial since Lee made no further objection or inquiry and did not call Ponani as a witness. The court did not commit error in dealing with Ponani's pretrial assertion of his Fifth Amendment privilege.

b. Lee's Motion to Reopen

While the dialogue between Lee and the court after both sides rested is confusing, it appears Lee had, in fact, been operating under the misunderstanding that the trial court had ruled Ponani's mere assertion of his Fifth Amendment privilege meant if called he need answer no questions. It also appears Lee was requesting he be allowed to reopen to allow an inquiry into the propriety of Ponani's invocation of that right.

A trial court has a wide discretion to allow a party to reopen its case for the taking of further evidence. A motion to reopen must be supported by a showing of good cause and due diligence. (*Broden v. Marin Humane Society* (1999) 70 Cal.App.4th 1212, 1222; Vol. 7, Witkin, Cal. Procedure (4th ed.) § 180.) The trial court here offered two bases for denial of the motion to reopen and call Ponani to the stand, the motion was untimely and that given the relationship

between Lee and Ponani, they should have been able to work out Lee's need for Ponani's testimony in advance.

The problem is that we interpret Lee's difficulty at the end of trial concerning Ponani's testimony to be based on Lee's misunderstanding of the court's earlier ruling and not on a lack of diligence. Under such circumstances, and given that the case was being tried before the court, it would have not have been unreasonable at that time to conduct an inquiry into Ponani's invocation of his Fifth Amendment right.

Neither do we think that the possibility Lee and Ponani might, given their close relationship, have come to some accommodation was a basis for not allowing Lee to call Ponani as a witness. In the final analysis, Lee and Ponani were separate parties and, whatever their personal relationship, Lee was entitled to call Ponani and examine him.

In the final analysis, however, we conclude any error in not allowing Lee to reopen and call Ponani was harmless. The crucial issue in the case was whether the monies given by Lee to Ponani were gifts or loans. Ponani had failed to list those monies in applications for loans from federally insured banks. If the monies Ponani received from Lee were loans, then the failure to list them in the applications was a crime. We do not know what question Ponani could answer, relevant to the pivotal issue of the nature of the monies given, without either incriminating himself or harming Lee's case. Thus, whatever else Ponani might have been able to say on other issues, he would have added nothing useful to Lee on the crucial issue of the characterization of the monies given him by Lee.

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B. *Sanctions*

Lee argues the $135,736 the trial court ordered he pay pursuant to the sanction provisions of section 128.7 must be reversed because he was not provided the 30-day "safe harbor" period required by the section.

1. Law

Section 128.7, subdivisions (b) and (c), authorizes the imposition of sanctions for presenting or advocating a paper primarily for an improper purpose, or for presenting or advocating a paper that contains an unwarranted legal or factual contention. (See California Judges Benchbook: *Civil Proceedings Before Trial* (Cont.Ed.Bar 2000) §§ 17.16-17.50.)

A motion for sanctions under section 128.7 must be made separately from other motions and must describe the specific conduct violating the section. The safe harbor provision of the section requires notice of the motion be served on the offending party but not filed or presented to the court unless "within 30 days after service of the motion, or such other period as the court may prescribe, the challenged paper . . . is not withdrawn or appropriately corrected." (§ 128.7, subd. (c)(1).) The language of the section allows the trial court to shorten or lengthen the safe harbor period.

In addition to the time requirements set by section 128.7, a party must also file his motion for sanctions prior to a final disposition of the claimed sanctionable conduct. Section 128.7 is designed to give a party the opportunity to correct

its conduct and avoid sanctions. If a motion pursuant to the section could be served and filed after the final disposition of the cited conduct, self-correction would be impossible and the purpose of the section defeated. (*Barnes v. Department of Corrections* (1999) 74 Cal.App.4th 126, 130, 132-133; *Malovec v. Hamrell* (1999) 70 Cal.App.4th 434, 441; *Ridder v. City of Springfield* (6th Cir. 1997) 109 F.3d 288, 293-296.)

Sanctions under the section are designed to promote compliance with statutory standards of conduct and not to be punitive. (*Malovec v. Hamrell, supra*, 70 Cal.App.4th at p. 441.) The goal of section 128.7 is deterrence and not compensation. (*Ridder v. City of Springfield, supra*, 109 F.3d at p. 293-294)[4]

Strict compliance with the safe harbor provisions of section 128.7 is required. Substantial compliance is insufficient since it is inconsistent with the plain language and the spirit of that provision of the section. (*Barnes v. Department of Corrections, supra*, 74 Cal.App.4th at pp. 135-136; *Cromwell v. Cummings* (1998) 65 Cal.App.4th Supp. 10, 14-15.)

2. Background

On July 14, 1998, Saraswati in her first amended answer stated as an affirmative defense that Lee's action was

4. Section 128.7 is derived from rule 11 of the Federal Rules of Civil Procedure (28 U.S.C.A.) (hereafter rule 11) and federal cases interpreting and applying that rule are useful in interpreting section 128.7. (*Malovec v. Hamrell, supra*, 70 Cal.App.4th at p. 440.)

frivolous and brought for the sole purpose of harassment. Saraswati stated she was entitled, pursuant to section 128.7, to attorney fees and expenses incurred in her defense. In her trial brief filed on August 7, 1998, Saraswati noted her earlier request for sanctions pursuant to section 128.7 and stated that it was her intention to pursue an award of sanctions after the court entered its statement of decision.

During argument on August 13, 1998, Saraswati requested that in its tentative decision the trial court shorten the 30-day safe harbor period defined by section 128.7. Lee conceded the trial court had the authority to reduce the safe harbor period but argued since Saraswati had allowed the case to go to trial, the "safe harbor period had dissipated." Lee argued the motion for sanctions pursuant to section 128.7 should have been brought before or at least during trial.

The court noted section 128.7 sanctions were mentioned in Saraswati's trial brief. Lee retorted that was not a sufficient request under section 128.7. The court agreed. Lee argued the requested for sanctions was untimely.

In its tentative decision finding against Lee, the court reserved the sanctions issue and stated it would entertain motions by August 17, 1998, should counsel wish to file them.

On August 17, 1998, Saraswati served Lee with a motion for sanctions but pursuant to the safe harbor provisions of section 128.7 did not file the motion with the court. On August 19, 1998, she requested the court set a date for filing of the motion for a hearing on the issue.

Appendix A

On August 18, 1998, Lee objected to Saraswati's various requests, arguing they were merely devices for circumventing the safe harbor provisions of section 128.7. Lee asked the court deem Saraswati's motion for sanctions filed on August 17, 1998, per the court's order of August 13, 1998, requiring all motions be made by that date.

On August 18, 1998, the trial court by minute order deemed the motion for sanctions filed that date set the hearing on the motion for sanctions for September 18, 1998.

Saraswati's motion for sanctions was filed on August 20, 1998.

The statement of decision finding for Saraswati was filed on September 4, 1998.

On September 18, 1998, the court, without explanation, found Saraswati's motion for sanctions timely under section 128.7, subdivision (c)(1), and awarded her sanctions in the amount of $135,736.

3. Discussion

Lee argues that putting aside the issue of whether he received the required 30-day safe harbor period, the request for sanctions was untimely since filed after the trial court's tentative decision finding for Saraswati.

Lee notes the safe harbor provisions of section 128.7 require not only that a party be given 30 days in which to withdraw or correct the subject paper but also require that

the motion be made before the conclusion of the case or the rendering of a dispositive ruling. This latter requirement flows from the basic rationale of the section, which is to give a party an opportunity to voluntarily withdraw or correct the challenged paper. (*Barnes v. Department of Corrections*, *supra*, 74 Cal.App.4th at pp. 132-137; *Malovec v. Hamrell*, *supra*, 70 Cal.App.4th at p. 438-444; *Goodstone v. Southwest Airlines Co.* (1998) 63 Cal.App.4th 406, 416-424; *Cromwell v. Cummings*, *supra*, 65 Cal.App.4th Supp. at p. 13.)

Saraswati acknowledges the rule but contends a tentative statement of decision is not a dispositive ruling since it does not constitute a judgment and is not binding on the court. (Cal. Rules of Court, rule 232(a).) It is clear, however, that a dispositive ruling for the purposes of section 128.7 need not constitute a judgment nor be binding on the court. Cases have found jury verdicts, the grant of demurrers and motions for summary judgments are dispositive rulings that cut off the right to move for sanctions pursuant to section 128.7. (See *Malovec v. Hamrell*, *supra*, 70 Cal.App.4th at p. 438-444; *Cromwell v. Cummings*, *supra*, 65 Cal.App.4th Supp. at p. 13; *Morganroth & Morganroth v. DeLorean* (6th Cir. 1997) 123 F.3d 374, 384.)

The parties engage in a series of arcane legal discussions concerning such matters as when a plaintiff loses the power to dismiss a case and whether a tentative statement of decision is a "dispositive" ruling. We conclude these issues inject into the matter a level of technicality unnecessary to the resolution of the issue of timeliness. The purpose of section 128.7 is not to provide compensation but rather to deter improper filings and to allow an early opportunity for the withdrawal of such filings.

Appendix A

The Advisory Committee Notes to the 1993 amendment of rule 11 states: "Ordinarily the motion should be served promptly after the inappropriate paper is filed, and, if delayed too long, may be viewed as untimely."[5] (28 U.S.C.A., Fed. Rules Civ. Proc., rule 11 (2000 pocket supp.) p. 285.)

We do not attempt to define a broad rule for determining when a motion for sanctions pursuant to section 128.7 is untimely as a matter of law. We are prepared to say, however, that waiting to the end of trial, after the court has stated its tentative decision, is so at odds with the goal and policy of section 128.7 that it is as a matter of law untimely.

The order granting Saraswati $135,736 in sanctions is reversed; in all other respects the judgment is affirmed. Saraswati Sukumar is to recover costs on appeal.

s/ Benke
BENKE, J.

I CONCUR:

s/ McIntyre
McINTYRE, J.

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5. These notes were adopted by the California Legislature as a statement of its legislative intent in enacting section 128.7. (*Barnes v. Department of Corrections*, *supra*, 74 Cal.App.4th at p. 132.)

Appendix A

Work, J., concurring:

I concur, however, I note as a factual matter, Saraswati's assertion, labeled "affirmative defense," that Lee's cause of action is frivolous, is nothing more than a contention his complaint as pleaded is without merit. That is, it does not qualify as an affirmative defense because it is not "a statement of any new matter constituting a defense." (Code of Civil Proc., § 431.30, subd. (b)(2).) Thus, to the extent that Saraswati suggests her purported affirmative defense may satisfy the notice requirement of section 128.7, she is mistaken because her allegation is nothing more than a general denial the complaint had merit.

s/ Work
WORK, Acting P. J.

APPENDIX B — STATEMENT OF DECISION OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF SAN DIEGO DATED AND FILED SEPTEMBER 4, 1998

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF SAN DIEGO

Case No. 708406

SHIH-HUA ALAN LEE,

Plaintiff,

v.

PONANI SUKUMAR, et al.,

Defendants.

STATEMENT OF DECISION

The case was tried before Honorable J. Richard Haden, August 10-13, 1998. Gary Brenner, Esq., represented the plaintiff; Kelly Rae Waggonner, Esq., represented defendant Ponani Sukumar; and John H. L'Estrange, Jr., and Craig M. Nicholas, Esq., represented defendant Saraswati Sukumar.

FACTS

Dr. Saraswati Sukumar married Mr. Sukumar in 1970 in India. She came to the United States in 1978 for post-doctoral training in Maryland and Mr. Sukumar followed in 1979 to attend the Wharton School. When she lived in

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Maryland and he lived in Pennsylvania she handled her finances separately. When Mr. Sukumar completed his education at Wharton, he joined her in Maryland and took over the bulk of the family finances.

Mr. Sukumar met Mr. Lee at Wharton where they were fellow students. The two became what Mr. Lee has described as "very close personal friends." They lived in the same dorm at one point and at another they lived in the same hotel.

When Mr. Sukumar left Wharton and joined Penn Mutual, Mr. Lee became his first client and purchased an insurance policy from him. When Mr. Sukumar became a broker at Shearson, Mr. Lee traded stock with him. As Mr. Sukumar moved from Shearson to E.F. Hutton and then on to Merrill Lynch, Mr. Lee similarly maintained accounts with Mr. Sukumar.

Mr. Lee and Doctor and Mr. Sukumar entered into a joint venture to purchase two Galaxy condominiums in New Jersey and two cooperative apartments at the Promenade in Maryland as tenants in common. Dr. Sukumar signed these purchase documents. When the one New Jersey condominium was sold in 1986, she signed the closing documents.

Judge Domnitz, in his July 23, 1997, Statement of Decision, ordered that the Maryland properties be sold. That sale has been delayed because of the bankruptcy proceeding of Dr. Sukumar. The one New Jersey condominium has been sold and the family court has apparently retained jurisdiction over these properties in the Family Court proceedings.

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Mr. Lee claims he has loaned the Sukumar Community $1,288,906 (Exhibit 74) and advanced additional cash to cover the co-op and condo negative cash flow. He maintains the Sukumars owe him $1,377,255. (Exhibit 73.) Mr. Sukumar has entered into a stipulation with Mr. Lee that he owes Mr. Lee $888,000 on these claims. (Exhibit 162.) Mr. Lee seeks all of these funds from Dr. Sukumar.

Dr. Sukumar regularly worked 10 to 11 hour days in her various laboratories. At least from 1991 to 1994, Mr. Sukumar remained at home in his locked home office which he did not permit Dr. Sukumar to enter unless he was present. His response to her many inquiries about his income was "none of your business" and that she made "peanuts" compared to him. In an application for a $25,000 line of credit, Mr. Sukumar listed no notes payable to Mr. Lee. Dr. Sukumar also signed this document. (Exhibit 375.)

FINDINGS

On The Evidence

The Court finds Dr. Sukumar had no knowledge of the cash payments from Mr. Lee to her husband. Dr. Sukumar and Mr. Lee have never discussed these transfers of cash. When she attempted to do so on one occasion after divorce was filed, he hung up on her.

Mr. Lee has proffered a series of documents, allegedly from Mr. Sukumar, which purport to be requests for loans. (Exhibits 1 through 14.) Dr. Sukumar did not sign those and did not even see them until the divorce proceedings ensued.

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Although these documents were allegedly faxed to Mr. Lee in Singapore, they contain no fax legend from either Mr. Sukumar or Mr. Lee. They appear to be typed on an old manual typewriter. Dr. Sukumar explained they owned a vintage student typewriter in their early married years, but Mr. Sukumar had used a computer word processor to prepare letters for many years. She further described her former husband's correspondence as "meticulous, carefully drafted documents." These letters are sloppy; they are not originals; they are copies. It is very likely that all these documents were produced at the same time and for the purpose of this litigation.

Mr. Lee did make a series of substantial payments, in some instances of amounts more than those which Mr. Sukumar requested, and yet Mr. Lee has no promissory notes or other documents memorializing these alleged loans. In fact, he has discarded the canceled checks which would have documented the dates on which interest would begin to accrue on each of the alleged loans. While he dismisses this as sloppy record-keeping, these checks would memorialize loans and interest in very large amounts. Any sophisticated business person would have maintained them.

Mr. Sukumar and Mr. Lee have remained personal friends who have recently dined together and attended "Star Trek" conventions together. Mr. Lee continues to advance large sums of cash to Mr. Sukumar's father, totaling between $180,000 and $500,000, notwithstanding the fact that he has only met this elderly gentleman five times, and entertains merely a slight expectation the father would ever have the ability to repay. While these recent cash advances are not

the subject of this suit, they are relevant to show the nature of the continuing financial relationship between Mr. Lee and Mr. Sukumar. Mr. Sukumar has no other income. These payments are, incredibly, very likely funding Mr. Sukumar's end of this litigation.

Witness Demeanor

The Court has carefully evaluated the demeanor and manner of testimony of each of the witnesses. The Court finds Dr. Sukumar is a highly credible witness. She has endeavored to provide truthful answers to detailed, complicated financial and legal questions which run back over 20 years. When one has been through three legal proceedings and answered interrogatories, given depositions, and been on the witness stand, it is always possible for competent, well-prepared counsel to point up trivial inconsistencies in the testimony of witnesses, even when that witness is telling the truth. In sum the Court believes her.

Mr. Lee is a very interesting gentleman. He's a well-educated, sophisticated businessman from a distinguished family. Given his background, these financial transactions, which he calls loans, accompanied by the inadequate explanations which are given for the lack of documentation of them, are inherently incredible.

With regard to Mr. Sukumar, the Court draws absolutely no inference whatsoever from his assertion of his Fifth Amendment privilege. However, the Court has had an opportunity to observe Mr. Sukumar throughout the trial. He has attended every session, paid very close attention to

all of the proceedings, and very often conferred with counsel both in writing and verbally. Frankly, anybody able to do that is able to go to work.

The Cash Transfers Are Gifts

Why has Mr. Lee transferred about a million and a half dollars to Mr. Sukumar, and why has he continued to transfer large additional sums to Mr. Sukumar's father for Mr. Sukumar's benefit? Mr. Lee says that he has respect for the Sukumars; believes Dr. Sukumar's patents and earning potential are sufficient to guarantee repayment; believes Mr. Sukumar, who has been unemployed for several years and claims to be suffering from acute depression, will get back on his feet and earn sufficient income to repay; and believes Mr. Sukumar's nearly 90 year old father's unusual writings may be publishable for profit. Mr. Lee has never been repaid a cent over the many years he has transferred these funds to Mr. Sukumar, yet he continues to make these transfers.

The Court finds Mr. Lee's claim the transfers are loans completely unbelievable and unsupported by the evidence. Even Mr. Lee had difficulty maintaining a straight face as he answered questions of the Court about his motivation in making these transfers. More reasonable inferences may be either Mr. Sukumar and Mr. Lee are business associates in an as yet undisclosed, undeclared and extraordinarily lucrative venture, and Mr. Lee is merely sending Mr. Sukumar his share of the profits, or perhaps Mr. Sukumar has some mysterious and powerful hold over Mr. Lee which enables him to exact large cash payments on demand from him. It is very likely this suit was orchestrated by Mr. Sukumar to gain a tactical advantage in the marital dissolution case.

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First Cause of Action

There are no promissory notes. Mr. Lee has discarded most of the alleged evidence of these transactions and that evidence which does exist may very likely have been fabricated for trial. The terms of the alleged loans are vague and change over time. There was no collateral, and Mr. Lee has neither seriously demanded any repayment nor has he ever received even one cent in repayment since 1981. Inherent in the evidence is a donative intent. These were voluntary transfers without consideration. Civil Code 1146. Accordingly, the Court finds that these cash transfers from Mr. Lee to Mr. Sukumar are gifts and not loans. The Court finds for the defendant Dr. Sukumar.

Second Cause of Action

Mr. Lee dismissed his second cause of action on the account stated.

Third Cause of Action

Mr. Lee has sought leave of court to conform to proof and denominated this action one in quasi-contract alleging unjust enrichment by Dr. Sukumar. With the exception of the real estate joint venture, Dr. Sukumar never signed any documents memorializing a financial transaction with Mr. Lee. She was kept completely in the dark by Mr. Sukumar and by Mr. Lee.

Mr. Lee did not talk to Dr. Sukumar about any of this and never required any documentation from her. In fact, when she called him, he refused to discuss it with her.

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Funds were received by Mr. Sukumar who misrepresented the nature of those funds to Dr. Sukumar. Mr. Sukumar told his wife he was simply earning lots of money in business transactions, some of which were related to Mr. Lee, and they were none of his wife's business. Mr. Lee concedes that the most recent transfers to Mr. Sukumar's father are more reasonably characterized as gifts than loans. One seeking equity must first do equity.

Mr. Lee's hands are not clean in this case. His explanation is unbelievable, and those few documents which exist are suspect, with the exception of the wire transfer documents. While the funds were transferred, these transfers merely completed the gifts. The Court finds for the defendant Dr. Sukumar.

The settlement between Mr. Lee and Mr. Sukumar, while welcome as all settlements are welcome, is hopefully not designed to further torment Dr. Sukumar somehow in the dissolution proceedings. As the Court has explained, Mr. Sukumar's likely future ability to repay $888,000 is extraordinarily remote.

Dr. Sukumar's Affirmative Claims

The breach of fiduciary duty and declaratory relief claims are resolved by the Court's findings on plaintiff's first cause of action that the transfers were gifts and not loans.

Dr. Sukumar also has alleged a conspiracy. Here there is a failure of proof. Tracing the $17,000 that Dr. Sukumar may have been entitled to in 1986 in Maryland,

a non-community property state, would be an interesting endeavor, to say the least, and probably cost more than $17,000 to accomplish. In any event, if Dr. Sukumar seriously wanted that $17,000 and believed she was entitled to receive it twelve years ago, she should have done something at that time. The statute's long run on that. She did sign the closing statement on that transaction. Any dispute over these apartments between Dr. Sukumar and Mr. Sukumar is reserved to the Family Court under Family Code section 1101.

Sanctions

The sanctions issue is reserved and the Court will entertain motions.

CONCLUSION

Dr. Sukumar is the prevailing party on all claims in the complaint. CCP 1032(a)(4).

IT IS SO ORDERED.

Dated: 9-4-98

s/ J. Richard Haden
J. RICHARD HADEN
Judge of the Superior Court

APPENDIX C — PROPOSED JUDGMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF SAN DIEGO DATED AND FILED OCTOBER 6, 1998

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN DIEGO

CASE NO. 708406

SHIH-HUA ALAN LEE, an individual;

Plaintiff,

v.

PONANI SUKUMAR, an individual; SARASWATI SUKUMAR, an individual; and DOES 1 THROUGH 20, INCLUSIVE,

Defendants.

SARASWATI SUKUMAR, an individual

Cross-Complainant,

v.

PONANI SUKUMAR, an individual, SHIH-HUA ALAN LEE, an individual, and ROES 21-30,

Cross-Defendants

Appendix C

PROPOSED JUDGMENT

This action was tried before Honorable J. Richard Haden on August 10-13, 1998, in Department 39 of the San Diego County Superior Court. Gary Brenner, Esq., represented plaintiff/cross-defendant Shih-Hua Alan Lee; Kelly Rae Waggonner, Esq., represented cross-defendant Ponani Sukumar; and John H. L'Estrange, Jr., Esq., and Craig M. Nicholas, Esq., represented defendant/cross-complainant Saraswati Sukumar.

On September 4, 1998, Honorable J. Richard Haden issued a Statement of Decision.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that:

1. Shih-Hua Alan Lee take nothing from Saraswati Sukumar on the complaint;

2. Saraswati Sukumar take nothing from Shih-Hua Alan Lee and Ponani Sukumar on Saraswati Sukumar's cross-complaint;

3. Saraswati Sukumar have and recover $135,736 in sanctions from Shih-Hua Alan Lee to be paid by November 17, 1998, with interest thereon at the rate of ten percent (10%) per annum from November 17, 1998, until paid.

DATED: OCT – 6 1998

s/ J. Richard Haden
JUDGE OF THE SUPERIOR COURT

Appendix C

APPROVED AS TO FORM:

WRIGHT & L'ESTRANGE
Attorneys for Defendant/
Cross-Complainant
Saraswati Sukumar

Dated: September 30, 1998

By s/ John H. L'Estrange, Jr.
John H. L'Estrange, Jr.

Attorney for Plaintiff
Shih-Hua Alan Lee

Dated: Sept. 29, 1998

By s/ Gary Brenner
Gary Brenner, Esq.

SELTZER CAPLAN
WILKINS & MCMAHON
Attorneys for Cross-Defendant
Ponani Sukumar

Dated: September 30, 1998

By s/ Kelly R. Waggoner
Kelly R. Waggonner, Esq.

APPENDIX D — ORDER OF THE SUPREME COURT OF CALIFORNIA DENYING PETITION FOR REVIEW DATED AND FILED FEBRUARY 14, 2001

Court of Appeal, Fourth Appellate District, Division One – No. D032371

S094184

IN THE SUPREME COURT OF CALIFORNIA

En Banc

SHIH-HUA ALAN LEE,

Plaintiff and Appellant,

v.

SARASWATI SUKUMAR,

Defendant and Respondent.

Petition for review DENIED.

s/ George
Chief Justice